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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

VINCENT J. BARTIMO,

Petitioner

versus

HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, HOME INSURANCE COMPANY, THOMAS F. RUSSELL, JR., AND THE RACING JOURNAL,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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December 19, 1985

MID-SOUTH PRESS, SHREVEPORT, LOUISIANA

QUESTIONS PRESENTED

I. Whether an appellate court may limit its review of the record in a First Amendment case to the ultimate factual finding of the constitutionally mandated actual malice element and decline to review the subsidiary factual findings supporting the ultimate determination regarding actual malice.

II. Whether, in a First Amendment libel action, a public figure plaintiff fails to meet the burden of showing that admittedly false statements were made with "actual malice" merely because:

(a) some of the false statements are preceded by the word "alleged," although no such "allegations" are shown to exist; and,

(b) Other false statements are found to be "merely . . . the product of literary license."

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HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, HOME INSURANCE COMPANY, THOMAS F. RUSSELL, JR., AND THE RACING JOURNAL,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Vincent J. Bartimo, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 23, 1985.

Opinions Below

The opinion of the Court of Appeals appears in 771 F.2d 894. Appendix A-1. The opinion of the District Court for the Western District of Louisiana appears in 592 F. Supp. 1526. Appendix A-14.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 23, 1985, and this petition for certiorari was filed within ninety days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

Constitutional Provision Involved

First Amendment to the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Statement of the Case

This diversity jurisdiction case concerns defamatory statements written by Thomas J. Russell, Jr., ["Mr. Russell"] in an article entitled "Outrage!" as published in the initial October 1981 issue of *The Racing Journal*, a magazine sponsored, financed, and supervised by the Horsemen's Benevolent and Protective Association. The offending article defamed Vincent J. Bartimo ["Mr. Bartimo"] by stating that he had "alleged Mafia connections" and calling him such names as "alleged Mafia Lieutenant Vincent Bartimo," "alleged Mafia," "alleged

Mafia Boss Bartimo," and "Snake." Probably the most blatantly defamatory statement was the following:

> The Mafia has long been known for their ability to "hit" anyone, usually by gang slayings. If Bartimo gets away with this attempt on "Billy Fox" his next hit could be — you.

The article appears in its entirety as Appendix II to the district court opinion. 592 F. Supp. at 1534. Appendix A-27. At the time the article was written and published, Mr. Bartimo was General Manager of Louisiana Downs, a racetrack located in Bossier City, Louisiana.

Mr. Russell testified that the only source (other than Mr. Russell himself) for the defamatory statements cited above was an article written over two years earlier in an Arkansas newspaper, concerning the majority stockholder of Louisiana Downs, Mr. Edward J. DeBartolo. The article reads in pertinent part:

> DeBartolo comes from Youngstown, O., a Mafia stronghold, and his top Lieutenants are Bartimo and Joe Aiello.

In this connection, Mr. Russell testified:

Q. *Can you tell me if anybody has ever told you that Mr. Bartimo is a member of the Mafia.*
A. No...

Vol. 5, p. 152.

Q. *I said it may use the word alleged.*
A. Has been alleged to be a member of the Mafia on several occasions.

Q. *By you?*
A. By me and by others.

Q. *You, of course, would be this article.*
A. That's right...

Vol. 5, p. 153.

Q. *All right, sir, is that where you got the so-called alleged Mafia from that [Orville Henry] article?*
A. Yes.

Q. *And that's the only place.*
A. Yes, sir. ...

Vol. 5, p. 157.

Q. *All right. Does it say in there that Mr. Bartimo is a member of the Mafia?*

A. No, it says he is a lieutenent [sic].

Vol 5., p. 157

The district court held:

> It is my opinion, and I expressly find, that the statements concerning Mr. Bartimo printed in the "Outrage!" article contained in the October 1981 issue of *Racing Journal* were false. Mr. Bartimo expressly denied any link with organized crime, particularly the Mafia, or any other criminal activities, and this testimony was unrebutted. The defendants failed to produce one shred of evidence tending to prove, or even infer, that Mr. Bartimo was, or is, actually connected with any criminal element. The allegations linking Mr. Bartimo with the Mafia must be classified as totally false and patently scurrilous. However, under the law, falsity of an assertion concerning a public figure does not establish liability in a defamation action.

592 F. Supp at 1530. Appendix A-21. The district court held, however, that Mr. Bartimo had not met his burden of proving actual malice with clear and convincing evidence.

Mr. Bartimo then appealed this decision to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals held that "plaintiff failed to carry the heavy burden imposed upon him by *Sullivan*," 771 F.2d. at 895. Appendix A-1.

Reasons for Granting the Writ

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

This Court has consistently held that in federal constitutional cases there must be an independent examination of the whole record.

Blackburn v. Alabama, 361 U.S. 199, 205 Note 5 (1960)

Edwards v. South Carolina, 372 U.S. 229, 235 (1963)

New York Times Company v. Sullivan, 376 U.S. 254, 285 (1964)

Beckley Newspapers Corporation v. Hanks, 389 U.S. 81, 82 (1967)

Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO Letter Carriers v. Austin, 418 U.S. 264, 282 (1974)

Bose Corporation v. Consumers Union of United States, Inc., 466 U.S. _____, _____ (1984)

This Court also recently held:

> At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question. Where, for example, as with proof of actual malice in First-Amendment libel cases, the relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law. See *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. at ____.

Frank M. Miller, Jr., v. Peter J. Fenton, Superintendent, Rahway State Prison, 54 Law Week 4022, 4025 (December 3, 1985).

The Court of Appeals, however, declined to review the subsidiary factual findings supporting the ultimate determination regarding actual malice, stating:

> We limit this level of scrutiny, however, to the ultimate factual finding of the constitutionally mandated actual malice element. For the reasons stated in *Tavoulareas* [*v. Piro*, 759 F.2d 90 (D.C. Cir. 1985)], we decline to undertake to review the credibility findings of the district court and the subsidiary factual findings supporting the ultimate determination regarding actual malice.

771 F.2d at 898. Appendix A-6. In so doing, the Court of Appeals

failed to follow the express admonition of this Court that there must be an independent examination of the whole record.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

The Fifth Circuit's standard of review conflicts with the following Circuits:

Second Circuit — Buckley v. Littell, 539 F.2d 882 (2nd Cir. 1976). "It is our duty to 're-examine the evidentiary basis' of the lower court decision," *Id.* at 888.

Lerman v. Flynt Distributing Co., Inc., 745 F.2d 123 (2nd Cir. 1984). "Accordingly, we 'make an independent examination of the whole record . .'" *Id.* at 140.

Marcone v. Penthouse International Magazine for Men, 754 F.2d 1072 (3rd Cir. 1985) "In First Amendment cases, 'an appellate court has an independent examination of the whole record'" *Id.* at 1088.

Third Circuit: McDowell v. Paiewonsky, 769 F.2d 942 (3rd Cir. 1985). "Rather, we must fulfill our obligation to 'make an independent examination of the whole record'." *Id.* at 951.

Tenth Circuit: Hardin v. The Santa Fe Reporter, Inc., 745 F.2d 1323 (10th Cir. 1984). "We have followed to the limited extent possible the admonition of the Supreme Court in *Bose, Inc. v. Consumers Union* as an appellate court to examine all we have before us as the record." *Id.* at 1326. (The appellant had not submitted the trial transcript for the court's review).

The Fifth Circuit referenced the panel majority's holding in *Tavoulareas v. Piro*, 759 F.2d 90 (D.C. Cir. 1985), for its standard of review. Judge J. Skelly Wright, in dissent, in *Tavoulareas* adhered to the principle enunciated by this Court which requires an independent appellate review for determination of actual malice. *Id.* at 146.

Although a petition for rehearing by the panel was denied in *Tavoulareas*, 763 F.2d 1472, the United States Court of Appeals for the D.C. Circuit ordered a rehearing *en banc* and vacated both the court's original opinion and judgment, as well as the opinion relating to the panel's denial for rehearing. Although argued on October 3rd, 1985, the case has not been decided. That ultimate *en banc* decision will undoubtedly result in a conflict in that if the opinion of the original panel is reaffirmed, then the District of Columbia Circuit will conflict with the Second, Third and the Tenth Circuits. On the other hand, if Judge Wright's views are confirmed, then the District of Columbia Circuit will conflict with the instant Fifth Circuit case.

3. THIS CASE POSES IMPORTANT AND UNRESOLVED QUESTIONS IN THE FIRST AMENDMENT LAW OF LIBEL. CERTIORARI IS WARRANTED HERE BECAUSE THE FIFTH CIRCUIT HAS RESOLVED TWO IMPORTANT CONSTITUTIONAL FACT QUESTIONS WHICH MAKE IT VIRTUALLY IMPOSSIBLE FOR A PLAINTIFF TO PREVAIL IN A FIRST AMENDMENT LIBEL ACTION.

(a) The Fifth Circuit has unfairly insulated false statements from actionable libel by holding that a public figure plaintiff fails to meet the burden of showing that admittedly false statements were made with "actual malice" merely because some of the false statements are preceded by the word "alleged," although no such "allegations" are shown to exist.

In finding that actual malice had not been proven, the Court of Appeals opinion placed heavy reliance on the use of the word "alleged" to precede certain Mafia allegations in the "Outrage!" article. In this regard, the Court of Appeals stated:

> At the outset we note that each reference is prefaced by the word "alleged." There is thus the threshold problem of interpreting — or misinterpreting — what Russell intended to say. While the story in its entirety may appear to assert the truth of Bartimo's Mafia ties, it carefully avoids doing so explicitly by using the word "alleged". ...
>
> Much of Bartimo's argument, however, assumes away Russell's use of the word "alleged" with each mention of Bartimo and the Mafia. Had Russell's article actually purported to accuse Bartimo of having Mafia connections, we would be more receptive to Bartimo's argument. As we have already observed,

> however, Russell's careful use of allegation language removes this interpretation from the realm of possibility.

771 F. 2d at 899, 900-01. Appendix A-10. In so holding, the Court of Appeals committed error in several ways.

First, and most simply, a perusal of the "Outrage!" article shows that what is probably the most blatantly defamatory statement in the article is not modified by the word "alleged." The last sentence of the "Outrage!" article states:

> The Mafia has long been known for their ability to "hit" anyone, usually by gang slayings. If Bartimo gets away with this attempt on "Billy Fox" his next hit could be you.

Of course, there is a simple reason why "alleged" was not inserted here. No one ever uttered such heinous calumny or served as a source for such a despicable statement. There is nothing in "Outrage!" showing any source for this statement. There is nothing in the trial transcript showing any source for this statement. There is nothing in the only purported "source," the Orville Henry article, showing any basis for this statement. Indeed, there is nothing in any book, magazine, pamphlet, or tract ever stating something so vile. It is simply made up.

Second, the Court of Appeals fell into error by ignoring that Mr. Russell was his own source of some of the "alleged" statements. The "Outrage!" article stated:

> Bartimo, with a stockholders' meeting out of the way (where his *alleged Mafia connections* and partnership with convicted felon Charles E. Roamer [sic] II were exposed) the previous day, had the Stewards write two letters — one to Fox demanding that he appear before the Stewards. The other letter was to bring before the Stewards *the man who charged Bartimo with being alleged Mafia and of being a partner with a man convicted in the Brilab Scam in New Orleans along with Carlos Marcello, referred to as the Godfather of the Southern Mafia.*

(emphasis supplied) Appendix A-32. In actuality, the source for this statement is the author of the article himself, Mr. Russell. He so admitted twice during the trial:

> **Q.** — *the other letter is to send before the stewards the man who charged Bartimo was [sic] being alleged Mafia. And was being a partner and so forth. Do you see that?*
>
> **A.** Yes.

Q. *Who is the man?*
A. I am the man.

* * * *

Q. *Do you recognize that letter?*
A. Yes, sir.

Q. *You wrote it?*
A. Yes, sir.

* * * *

Q. *Did you, in fact, attempt to expose his Mafia connections at a stockholder's meeting at Louisiana Downs?*
A. Yes, I did.

Vol. 5, pp. 148, 160.

Thus, twice in the "Outrage!" article Mr. Russell refers to Mafia connections being "alleged" by third parties, when in actuality he made those statements himself. Certainly, a publisher cannot protect himself against a defamation suit by hiding behind the word "alleged" when he is the author of the allegations.

Finally, use of the word "alleged" to precede the other defamatory statements in the article does not negate actual malice. Certainly, this Court has never held that use of the word "alleged" removes the defamatory taint of statements. Allowing "alleged" to serve as an invulnerable shield against liability for defamatory statements would allow publishers to write whatever malicious falsehoods they wanted and would upset the "appropriate accommodation between the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances." *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976). The United States Court of Appeals for the Second Circuit has stated that describing an individual as a person "with alleged mob ties" could constitute defamation. *Bufalino v. The Associated Press*, 692 F.2d 266, 269 (2nd Cir. 1982).

In actuality, "alleged" is merely a signal to the reader that a third party has made an unproven accusation. The only purported source here (other than Mr. Russell quoting himself in the third person) is

the Orville Henry article.[1] As Mr. Russell testified:

Q. *All right, sir. Is that where you got the so-called alleged Mafia from that [Orville Henry] article.*

A. Yes.

Q. *And that's the only place.*

A. Yes, sir.

Vol. 5, p. 157. The Orville Henry article states as follows:

> DeBartolo comes from Youngstown, O., a Mafia stronghold, and his top lieutenants are Bartimo and Joe Aiello.

That article certainly did not state Mr. Bartimo was in the Mafia. Nor, as Mr. Russell also admitted, did Mr. Henry ever tell Mr. Russell that Mr. Bartimo was in the Mafia:

Q. *[Mr. Orville Henry] didn't tell you that Mr. Bartimo was a member of the Mafia, did he?*

A. No, he did not.

Vol. 5, p. 157.

Nor does the "Outrage!" article indicate that Mr. Russell understood the Henry article to state that Mr. Bartimo was in the Mafia. Indeed, the only reference in "Outrage!" to the Henry story never mentions the Mafia:

(Ed's Note: In a copyrighted article in the Arkansas Gazette Orville Henry disclosed that Bartimo was a Lieutenant in the army of DeBartolo.)

---

[1]The Court of Appeals referred to "an admittedly obscure reference to other indirect sources for the allegation, to 'information [to that effect] getting around'. Counsel for Bartimo did not, however, follow up with questioning on the precise identity of these word-of-mouth sources. Thus, it is clear Russell had sources for his charge that Bartimo was an *'alleged'* Mafia figure." 771 F.2d at 901. Appendix A-11. In so stating, the Court of Appeals ignored Mr. Russell's own testimony that there were no word-of-mouth sources:

Q. *Can you tell me if anybody has ever told you that Mr. Bartimo is a member of the Mafia.*

A. No.

Vol. 5, p. 152. As quoted in the text immediately above, Mr. Russell also testified that Mr. Henry did not tell him that Mr. Bartimo was a member of the Mafia. Vol. 5, p. 157.

Pl. Ex. 1, p. 9. Appendix A-28. This editor's note shows that Mr. Russell knew precisely what Mr. Henry said and precisely what Mr. Henry meant. He demonstrated actual knowledge that Mr. Henry never said Mr. Bartimo was in the Mafia, was a Mafia lieutenant, or was a Mafia boss. Clearly then, the defamatory statements in "Outrage!" are the type of "sheer fabrication" which constitute actual malice. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968); *Carson v. Allied News Company*, 529 F.2d 206 (7th Cir. 1976).

The defendants obviously cannot rely on the Henry statements as asserting that Mr. Bartimo is a Mafia member, chief, or uses "hits" in "gang slayings." Viewed in a light most favorable to the defendants, the *most* that can be said in their favor is that they completely altered Mr. Henry's statements and took them out of context. Such an action on their part does not evidence the type of good faith that negates the presence of actual malice. As the United States Court of Appeals for the Second Circuit stated in *Goldwater v. Ginzburg*, 414 F.2d 324 (2nd Cir. 1969):

> Furthermore, in our case, Ginzburg added certain innuendoes to some quoted statements and quoted other statements out of context in order to support his predetermined result. One cannot fairly argue his good faith or avoid liability by claiming that he is relying on the reports of another if the latter's statements or observations are altered or taken out of context. Also, if Ginzburg's "melding" and "distillation" of letters results in misplaced emphasis, or exaggeration, or distortion, he cannot reasonably maintain that the misstatements contained in the new product he thereby created are not his own misstatements.

Id. at 337; *accord*, *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113, 120 (2nd Cir. 1977).

Eight days after writing his article, and after receiving a letter of complaint from Mr. Bartimo, Mr. Henry apologized for his earlier statements:

> APOLOGY: Vincent J. Bartimo, president and general manager of Louisiana Downs takes exception to the use of the word Mafia in a paragraph of a column dealing with himself, track owner Edward J. DeBartolo and another associate, Robert Aiello.

> No connection was intended, his point is well taken, and he has my apology.
>
> As the whole of the column tended to indicate, there appears to be nothing but good works in the careers of DeBartolo, Bartimo and Aiello, and what they are achieving at Louisiana Downs is a tribute to solid Italian-American enterprise.

Pl. Ex. 8. During their conversation, Mr. Russell never asked Mr. Henry whether there had been an apology or retraction:

Q: *And you made no investigation of whether or not there was any type of apology or retraction.*

A: I told you I called Mr. Orville Henry. Mr. Orville Henry did not mention any apology or retraction.

Q: *Did you ask him?*

A: Did I ask him what?

Q: *If he had apologized or retracted the article.*

A: No.

Vol. 5, p. 158. No apology or retraction by Mr. Henry is ever mentioned in the "Outrage!" article.

(b) The Fifth Circuit has unfairly insulated false statements from actionable libel by holding that a public figure plaintiff fails to meet the burden of showing that admittedly false statements were made with "actual malice" merely because other false statements are found to be "merely . . . the product of literary license."

The Court of Appeals found the statement in "Outrage!" that Mr. Bartimo was a Mafia boss and the reference to his having people hit by gang slayings "merely false or the product of literary license," citing several decisions of this Court. 771 F.2d at 901. Appendix A-11. A reading of these cited cases fails to disclose any reference to "literary license." Assuming *arguendo* that there is a protected area for literary license, such protection surely could not extend to fabricating a statement that a decent, law-abiding man, prominent in his community, will have opponents hit by gang slayings. If this is literary license, there are no boundaries to this protected area and any sort of baseless

and outrageous statement can be hurled at a public figure. What worse charge could anyone conceive of than that an individual has "an ability to 'hit' anyone, usually by gang slayings." This Court in *Garrison v. Louisiana*, 379 U.S. 64, 75, made clear that such calculated falsehoods are impermissible:

> The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration . . . Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . ." Chaplinsky v New Hampshire, 315 US 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Certainly, readers of the "Outrage!" article did not interpret the "Mafia" and "hit man" allegations as merely hyperbole or poetic exaggeration. Mr. Russell testified as follows concerning letters to the editor received after publication of the article:

Q: *I would be happy to be specific. Isn't it a fact that a woman by the name of Peggy Brown wrote to you as the editor and stated that the October 1st magazine was very good, especially the Fox article. I'm sure you worry about being found in the middle of the river somewhere but I am glad that someone has the guts to get it down — Peggy Brown.*

A: What is your question about that, sir?

Q: *Did she write that to you?*

A: Yes.

Q: *And you published it in your magazine.*

A: Yes.

Q: *You published in your next issue.*

A: Letters to the editor column.

Q: *November-December, 1981 issue.*

A: Yes.

Q: *In connection to the Peggy Brown letter, is it not a fact that in the March-April, 1982 issue of the Racing Journal, you received an unsigned communication which you thought enough of to print that says — Dear Tom, I read both of the first two editions of the Racing Journal cover to cover. I think you are doing one hell of a job for racing. Especially, if suggested by Peggy Brown and you — your November-December issue — if you live long enough. I am really going to test your courage and integrity and see if you will print this letter. And you did, in fact, print it, did you not?*

A: Yes sir.

Q: *And in the same magazine, did you not receive a letter from Virgil Waites, which read as follows: Editor, I really enjoyed your magazine. Looks like the "Snake" and his cronies are finally being exposed for what they really are — a bunch of damned crooks. Keep up the good work and tell it like it is.*

A: What is your question?

Q: *Did that also appear in your Racing Journal?*

A: Yes.

Vol. 5, pp. 165, 166.

These letters to the editor of *The Racing Journal* show that readers did not consider these statements to be "Literary License," but instead to be the true statements about the character of Mr. Bartimo. When such statements, are as the District Court stated "[C]lassified as totally false and patently scurrilous," [592 F. Supp. At 1530 Appendix A-21] they are defammatory.

Conclusion

The decision of the Court of Appeals in this case conflicts with several First Amendment decisions by this Court. Further, the decision and the recent *Tavoulareas* decision 759 F.2d 90, vacated in part, 763

F.2d 1472, 1481 (D.C. Cir. 1985) demonstrate that there is an important conflict between the circuits regarding the proper review of district court decisions in libel cases. Finally, this case poses important and unresolved questions in libel law, as the Court of Appeals has insulated a publisher from liability for defamatory statements by (a) holding that use of the word "alleged" preceding an allegation negates defamatory intent, and (b) by inventing a concept of "literary license" that knows no boundaries.

For the reasons set forth in this petition a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

Vincent J. BARTIMO,
Plaintiff-Appellant,

v.

HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION
Horsemen's Credit Union,
Thomas F. Russell, Jr., and the
Racing Journal, Defendants-Appellees.

No. 84-4550.

United States District Court of Appeals,
Fifth Circuit.

Sept. 23, 1985.

Before RANDALL, DAVIS, and HILL, Circuit Judges.

ROBERT MADDEN HILL, Circuit Judge:

In an action for defamation under Louisiana law the district court in a nonjury trial granted defendant's motion for involuntary dismissal, Fed.R.Civ.P. 41(b), after plaintiff rested, on the ground that plaintiff had failed to show actual malice as required by *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). *Bartimo v. Horsemen's Benevolent and Protective Association, 592 F.Supp. 1526 (W.D.La.1984). Because we agree that plaintiff failed to carry the heavy burden imposed upon him by Sullivan*, we affirm.

I.

In the spring of 1981, defendant Thomas F. Russell, Jr., was a member of the Louisiana Division of the Horsemen's Benevolent and Protective Association (HBPA), a national organization dedicated to the advancement of the interests of racehorse owners, breeders, trainers and others connected with the horse racing business. Plaintiff Vincent J. Bartimo was then President and General Manager of Louisiana Downs Racetrack in Bossier City, Louisiana. That spring Russell and other members of the HBPA, including most of its board of directors, instituted a new publication intended to cure what the local HBPA

perceived as shortcomings in the national HBPA publication. Russell *volunteered to edit, publish and distribute* the new publication, the *Racing Journal*, with the sponsorship of the HBPA.

The first issue of the new publication, which appeared in October 1981, contained an article entitled "Outrage!" written by Russell. The article described Bartimo's role in the suspension of owner-trainer William I. Fox from racing privileges at Louisiana Downs. The thrust of the article was that Bartimo initiated the disciplinary action in retaliation for Fox's testimony in a trial involving the fixing of certain horse races in New Orleans. Russell's article posited as Bartimo's motive "alleged mafia connections" between him and those accused of fixing the races. More specifically, Russell's article: (1) referred to Bartimo as "alleged Mafia Lieutenant Vincent Bartimo," and "alleged Mafia boss Bartimo"; (2) claimed that Bartimo was "unaffectionately called 'Snake'" in his previous employment in Vermont; (3) alleged that Bartimo had a "partnership with convicted felon Charles E. Roamer II"; (4) charged that Bartimo had stated he would "own the new Racing Commission just like he did the last one"; and (5) stated that Bartimo had threatened to "crush" certain horsemen "like ants." Russell concluded the article with the following charges: "The Mafia has long been known for their ability to 'hit' anyone, usually by gang slayings. If Bartimo gets away with this attempt on 'Billy Fox' his next hit could be—you."

Bartimo then brought this action for defamation against Russell, the HBPA, and the HBPA's insurer, Home Insurance Company.[1] Louisiana law requires that a plaintiff show the following elements in order to be entitled to recovery: (1) publication; (2) falsity; (3) malice, actual or implied; and (4) resulting injury. *Manale v. City of New Orleans*, 673 F.2d 122, 125 (5th Cir. 1982). *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 725-26, 11 L.Ed.2d 686 (1964).

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[1]The HBPA and its insurer Home Insurance Co., also a defendant, cross-claimed against Russell claiming he was solely responsible for the article. Russell cross-claimed against the HBPA and the insurance company for defense and indemnity.

Bartimo also named the Horsemen's Credit Union as a party defendant but summary judgment was granted in its favor prior to trial. There is no appeal from this ruling.

heightens the required showing on state of mind to the level of "actual malice" where the allegedly defamatory statements are made about a "public official." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162, 87 S.Ct. 1975, 1995, 18 L.Ed.2d 1094 (1967), extended the *Sullivan* rule to "public figures." After Bartimo rested his case, the district court dismissed under Rule 41(b) on the ground that he had failed to present evidence sufficient to support a finding of actual malice under *Sullivan*. The court first found, however, that the defendants had "published" the "Outrage!" article and that the statements about Bartimo in the article were false. 592 F.Supp. at 1530. The court did not reach the issue of resulting injury. *Id.* Bartimo appeals claiming only that he did indeed sufficiently establish actual malice.

II.

In *Bose Corp. v. Consumers Union of United States, Inc.*, ___ U.S. ___, ___, 104 S.Ct. 1949, 1967, 80 L.Ed.2d 502, 526 (1984), we were instructed that appellate courts must exercise independent judgment when reviewing "determination[s] of actual malice in ... case[s] governed by *New York Times v. Sullivan*" (footnote omitted). Thus, the clearly erroneous standard of Fed.R.Civ.P. 52(a) is set aside in order to safeguard the First Amendment values threatened by a finding that speech caused compensable harm. As the Court stated in *Bose*:

> The requirement of independent appellate review reiterated in *New York Times v. Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common law heritage. It reflects a deeply held conviction that judges—and particularly members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

_____ U.S. at _____, 104 S.Ct. at 1965, 80 L.Ed.2d at 523. As regards the review of actual malice determinations, the Court stated the rule of independent review in terms broad, clear and without exception.

[1] Nevertheless, Russell contends that the appropriate standard is that supplied by Rule 52(a) since the rationale underlying the *Bose* rule of independent review does not obtain in this case. That is, the argument continues, the district court's finding of no actual malice and its dismissal of the plaintiff's defamation claim presents no threat to the First Amendment values defended by Russell and the HBPA. Therefore, Russell concludes, the district court's judgment should be subjected only to the less exacting clearly erroneous standard. We reject the argument.

First, it is not clear to us that the rationale of *Bose* is inapplicable here, for definition of First Amendment protections requires inclusion as well as exclusion and the former is no less a judicial function merely because it does not pose a direct threat to First Amendment values. Including speech within the protected category requires no less careful an evaluation of constitutionally significant facts than excluding such speech. *Cf. Bose*, _____ U.S. at _____, 104 S.CT. at 1961, 80 L.Ed.2d at 519. In addition, Russell's argument fails to account for the Supreme Court's broad language in *Bose*, which purported to make no distinction whatever between cases in which judgment was in favor of the alleged defamer and those in which judgment was in favor of the alleged defamed. We think if the Court had intended to make such a distinction it would have so limited its holding. The notion that such evaluations fall within the peculiar province of the judicial function is critical to the rule of *Bose*.

Moreover, prior to *Bose* the Supreme Court has, under the authority of *Sullivan*, engaged in independent review of a trial court's finding of no actual malice. In *Associated Press v. Walker*, 388 U.S. at 140-42, 87 S.Ct. at 1983-84, the companion case to *Curtis Publishing Co. v. Butts*, the trial court had granted judgment notwithstanding a jury verdict for punitive damages on the ground that the evidence supported a finding of no more than ordinary negligence on the defen-

dant's part. *Id.* Both the Court of Appeals and the Supreme Court affirmed, the latter undertaking "to face for [them]selves the question whether there is sufficient evidence to support the finding" of actual malice. *Id.* at 158, 87 S.Ct. at 1993.[2]

Finally, no court of appeals has recognized the distinction for which Russell contends. *Cf. Levine v. CMP Publications, Inc.*, 738 F.2d 660, 672-73 n. 19 (5th Cir. 1984) (*Bose* standard inapplicable to review of jury's finding that statements were false), *reh'g denied*, 753 F.2d 1341 (1985). On the contrary, the Tenth Circuit has, albeit without discussing the argument Russell advances here, undertaken independent review of a district court's judgment for defendants on the ground that no actual malice was demonstrated. *Hardin v. Santa Fe Reporter, Inc.*, 745 F.2d 1323, 1326 (10th Cir.1984). Most recently, the D.C. Circuit has done likewise in reviewing a district court's judgment n.o.v. in favor of defendants on the ground that actual malice was not sufficiently demonstrated. *Tavoulareas v. Piro*, 759 F.2d 90, 107 (D.C. Cir.1985). We follow the lead of *Hardin* and *Tavoulareas* for the reasons expressed above and because we cannot see the sense of applying "a rule of federal constitutional law," *Bose*, _____ U.S. at _____, 104 S.Ct. at 1965, 80 L.Ed.2d at 523, only if the plaintiff prevails at trial.[3]

We therefore undertake independently to review the entire record

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[2]The Court thus declined to follow the concurrent findings standard of review by which the Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Grover Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 538, 93 L.Ed. 672 (1949).

[3]Russell's argument would introduce the possibility of a particular record being reviewed by two different standards as it made its way through the appellate process. If, for instance, we were to accept Russell's position and find the district court's judgment to be clearly erroneous because actual malice was shown, the Supreme Court, were it to grant review, would be compelled to review the record independently as it did a reversal by the Seventh Circuit in *Time, Inc. v. Pape*, 401 U.S. 279, 284, 91 S.Ct. 633, 636, 28 L.Ed.2d 45 (1971), a precursor of *Bose*. Unhappily, the Seventh Circuit did not identify the standard by which it reviewed the district court's summary judgment in favor of defendants on the ground actual malice had not been shown. See Pape v. Time, Inc. 354 F.2d 558, 560-61 (7th Cir.1965). We think judicial economy is best served by requiring the same standard of review at all levels, regardless of the outcome below.

in order to determine whether the district court properly concluded that Bartimo failed to demonstrate actual malice. We limit this level of scrutiny, however, to the ultimate factual finding of the constitutionally mandated actual malice element. For the reasons stated in *Tavoulareas*, we decline to undertake to review the credibility findings of the district court and the subsidiary factual findings supporting the ultimate determination regarding actual malice. *See* 759 F.2d at 107-09. We think, as the *Tavoulareas* court did, that this limitation is at least implicit in *Bose* and mandated by considerations of economy, the nature of appellate review and the advantageous position of the fact finder to make such decisions. *Id.*

III.

The actual malice test of *Sullivan* "requires a plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement." *Bose*, _____ U.S. at _____, 104 S.Ct. at 1965 n. 30, 80 L.Ed2d at 525 n. 30. The latter prong of the test is merely an interpretation of the standard stated in *Sullivan*, 376 U.S. at 279-80, 84 S.Ct. at 725-26, as "with reckless disregard of whether it was false or not." *Gertz v. Welch*, 418 U.S. 323, 334 n. 6, 94 S.Ct. 2997, 3004 n. 6, 41 L.Ed.2d 789 (1974); *see also Brewer v. Memphis Publishing Co.*, 626 F.2d 1238, 1258 (5th Cir.1980) (must show "a high degree of awareness ... of the article's falsity or probable falsity.").

[2] Moreover, as the district court so ably explained, *Bartimo*, 592 F.Supp. at 1529, 1532, there is a distinction between the ordinary understanding of actual malice in the sense of ill-will and the *Sullivan* understanding of it in the sense of knowledge or reckless disregard of falsity. *See Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82, 88 S.Ct. 197, 198, 19 L.Ed.2d 248 (1967). Liability turns not on the extent of the hatred, hostility, spite or intention to harm that defendant bears for plaintiff, but on his subjective evaluation of the accuracy of the statements he publishes to serve his motives. *See Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6, 10-11, 90 S.Ct. 1537, 1539-40, 26 L.Ed.2d 6 (1970); *see also Garrison v. Loui-*

siana, 379 U.S. 64, 73, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964).

[3] The reckless disregard standard is, by nature, susceptible only of case-by-case definition and clarification. *St. Amant v. Thompson*, 390 U.S. 727, 730-31, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968). It is clear enough, nonetheless, that a failure to investigate is not sufficient in itself to establish reckless disregard. *Id.* at 733, 88 S.Ct. at 1326. Thus, "reckless conduct is not measured by whether a reasonably prudent [person] would have published, or would have investigated before publishing" but by whether a particular defendant *"in fact* entertained serious doubts as to the truth of [the] publication." *Id.* at 731, 88 S.Ct. at 1325 (emphasis added). This the plaintiff must demonstrate clearly and convincingly.

> By the same token, however, a defendant cannot ... automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

Id. at 732, 88 S.Ct. at 1326 (footnote omitted.)

IV.

[4] Turning to the statements about which Bartimo complains, no evidence whatsoever was introduced regarding Russell's belief that Bartimo made the "ants" statement. Bartimo clearly failed to carry his burden of proving actual malice connected with that statement. Similarly, concerning the nickname "Snake," Russell testified that three different persons had informed him of the prevalence of the epithet as applied to Bartimo. The only rebuttal was Bartimo's own

testimony that he had never heard himself referred to in that manner. This testimony, of course, had only remote and indirect relevance, if any, to Russell's belief that Bartimo was called "Snake." The evidence thus clearly failed to support even an inference of actual malice connected with the nickname. Regarding the charge of a partnership with "convicted felon Charles E. Roamer II," Russell testified without contradiction both that Bartimo had at one time owned land jointly with Roamer and that Roamer had been convicted of a felony. Even Bartimo did not testify otherwise. There was thus no evidence, direct or circumstantial, that Russell doubted the accuracy of this statement.

There was something more of a contradiction regarding the statement about "own[ing] the new Racing Commission." Bartimo denied having made such a statement. The only testimony elicited from Russell concerning Bartimo's influence with the Racing Commission was to the effect that Russell did in fact have the opinion that Bartimo "owns" three men on the Commission, this in reference to a sentence in the "Outrage!" article to that effect. In addition, Russell testified that Bartimo had said to Russell that the upcoming gubernatorial election would have no effect on Louisiana Downs because he (Bartimo) would own the new governor just as he had the prior or present one. Russell was never asked whether Bartimo had actually said he would own the Commission. Clearly then, Bartimo failed to demonstrate that Russell doubted the accuracy of this statement.

[5] The trial and the arguments of counsel below and on appeal focused almost exclusively on Russell's references to Bartimo's alleged ties with the Mafia. At the outset we note that each reference is prefaced by the word "alleged." There is thus the threshold problem of interpreting—or misinterpreting—what Russell intended to say. While the story in its entirety may appear to assert the truth of Bartimo's Mafia ties, it carefully avoids doing so explicitly by using the word "alleged." In our view the "Outrage!" article's reference to Bartimo and the Mafia can be read as no more than a report that Bartimo has, at sometime or other, been allegedly connected with the Mafia.

Russell's only source for the Mafia allegations was an article in the June 14, 1979, issue of the Arkansas Gazette written by Orville

Henry. In the first paragraph of the "Outrage!" article Russell refers explicitly to Henry's article. The relevant portion of the Henry article referred to Bartimo's then employer Edward DeBartolo[4] and stated: "DeBartolo comes from Youngstown, Ohio, a Mafia stronghold and his top lieutenants are Bartimo and Joe Aiello. 'Ciaio' [sic] was a frequently heard greeting at Wednesday's lavish Louisiana luncheon." The Mafia reference was retracted about a week later by Henry in response to an indignant letter from Bartimo. In November 1980, when Russell began the research for the "Outrage!" article, Russell was already familiar with Henry's article. Subsequently, when Russell called Henry to verify the story sometime in 1981, Henry neither mentioned the retraction nor told Russell that Bartimo was in the Mafia. Nor did Russell ask Henry if there had been a retraction of or apology for the article.[5]

Bartimo first argues that actual malice was shown since the Henry article cannot be read as an allegation that Bartimo was connected with the Mafia and that therefore Russell's statements were fabrications. *See St. Amant*, 390 U.S. at 732, 88 S.Ct. at 1326. We disagree. We think the relevant portion of the article quite susceptible of the interpretation Russell placed upon it. Indeed, Bartimo revealed in his response letter to Henry that he himself interpreted the article as a "declaration that I am a member of the Mafia." Bartimo now argues that Russell could not have so interpreted the article but we think it clear that he could have and, indeed, was quite reasonable in doing so.

Our holding is buttressed by that in *Time, Inc. v. Pape*, 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45 (1970). There Time magazine failed to use such words "alleged" or "allegation" in its description of certain incidents involving alleged police brutality. The descriptions were drawn from those in a report by the United States Commission on Civil Rights. The Commission's report was itself "extravagantly

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[4]Bartimo began his association with DeBartolo in 1975 and continued in his employ until his tenure at Louisiana Downs ended in early 1982.

[5]Exactly what transpired in the conversation does not appear in the record but Russell's counsel stated at oral argument that, upon being asked about the article, Henry said, "Forget about it," and hung up the telephone. Counsel for Bartimo did not contradict this.

ambiguous" in indicating whether or not the Commission believed that the incidents described were true or merely accounts of allegations in pleadings filed in those cases. Despite Time's failure to use words such as "alleged" or "allegation" the Court held that the evidence was not sufficient to create a jury issue under Sullivan since Time's was "one of a number of possible rational interpretations of a document that bristled with ambiguities." *Id.* at 290, 91 S.Ct. at 639.

Henry's article was no less ambiguous with regard to whether it actually was alleging a connection between Bartimo and the Mafia and Russell's interpretation was no less reasonable than Time's. Bartimo's reading of the evidence, assuming as it does a narrow and selective interpretation of the Henry article, is not sufficient to compel an inference that Russell fabricated the Mafia allegation. Russell's conduct reflected, at most, an error in judgment. *Time, Inc. v. Pape*, 401 U.S. at 292, 91 S.Ct. at 640.

Finally, Bartimo argues that Russell's investigation for the "Outrage!" article was grossly inadequate in the circumstances. Where investigation for a story that is not "hot news" is grossly inadequate in the circumstances, actual malice may be inferred from the publisher's failings as an investigator. *Vandenburg v. Newsweek, Inc.*, 441 F.2d 378, 380 (5th Cir.1971) (citing *Curtis Publishing Co. v. Butts*, 388 U.S. at 156-58, 87 S.Ct. at 1992-93). Bartimo goes on to argue that Russell should be required to buttress his story with more than the ambiguous Henry article and to verify the Henry article with more than the ambiguous telephone call to Henry.

Much of Bartimo's argument, however, assumes away Russell's use of the word "alleged" with each mention of Bartimo and the Mafia. Had Russell's article actually purported to accuse Bartimo of having Mafia connections, we would be more receptive to Bartimo's argument. As we have already observed, however, Russell's careful use of allegation language removes this interpretation from the realm of possibility. Given the equivocal nature of the information the "Outrage!" article conveyed, that is, that Bartimo *allegedly* had ties to the Mafia, Russell's investigation was adequate. Again, as we have already noted, the Henry article can reasonably be read as an allegation that Bartimo was a Mafia lieutenant in DeBartolo's army. In

addition Russell, in his testimony, made an admittedly obscure reference to other indirect sources for allegation, to "information [to that effect] getting around." Counsel for Bartimo did not, however, follow up with questioning on the precise identity of these word-of-mouth sources. Thus, it is clear Russell had sources for his charge that Bartimo was an *"alleged"* Mafia figure. We therefore hold that while Russell might have done more to substantiate his report of the accusations, his investigation was adequate in the circumstances.

It might be asked whether Bartimo could have done more to carry his burden or if the case ended when Russell testified under oath that he believed what he wrote. The answer to the first question can only be that more could have been done. For instance, Russell's state of mind as to some of the statements was not examined. Also, the telephone call Russell made to Henry was not testified to in detail. It may be that the obscureness of the record is due solely to the procedural disposition of the case. It may be that Bartimo brought out all the testimony in his favor when he had the opportunity and that there simply was not more evidence to adduce. In any event, it is clear to us that our holding leaves ample room for future plaintiffs to maneuver successfully within the *Sullivan* framework. The answer to the second question must therefore be the same "no" as that given by the Court in *St. Amant*, 390 U.S. at 732, 88 S.Ct. at 1326. The case ended not when Russell testified to his own good faith but when Bartimo failed to show that Russell subjectively doubted or recklessly disregarded the truth of his statements.

Russell admittedly engaged in hyperbole and displayed bad judgment, for instance by calling Bartimo a "Mafia *Boss*" and by referring to "gang slayings" and "hits" in the final paragraph of "Outrage!" The title itself illustrates the point as well. The district court found the statements to be false. Nonetheless, the First Amendment, as explicated in *Sullivan* and its progeny, instructs us that the law of libel cannot purport to punish the defamer or compensate the defamed when the allegedly libelous statements are merely false or the product of literary license. See *Sullivan*, 376 U.S. at 279, 84 S.Ct. at 725; *Time, Inc. v. Pape*, 401 U.S. at 290-92, 91 S.Ct. at 639-40; *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979); *Bose*, _____ U.S. at _____, 104 S.Ct. at 1966, 80

L.Ed.2d at 525. As the Court said in *Sullivan*, "erroneous statement is inevitable in free debate, and ... it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need ... to survive'." 376 U.S. at 271-72, 84 S.Ct. at 721 (citations omitted). The actual malice standard is the instrument with which the courts have struggled to carve out this breathing space in a complex and litigation-saturated culture. The district court's dismissal of Bartimo's action as to Russell is its affirmation, however reluctant, *see Bartimo*, 592 F.Supp at 1533, of its necessary role in this struggle.

V.

Having held that Bartimo failed to demonstrate actual malice on the part of Russell, the district court considered it unnecessary to determine whether the HBPA could be vicariously liable under a respondeat superior theory or otherwise. Similarly, our resolution of the appeal in favor of Russell renders it unnecessary for us to consider the parties' arguments regarding imputation of Russell's fault to the HBPA.

[6] The district court also found that Bartimo failed to demonstrate actual malice on the part of the HBPA. We agree. The only evidence even approaching evidence of the HBPA's actual malice was testimony to the effect that two members of a committee of the HBPA's board of directors appointed to oversee publication of the Racing Journal read the "Outrage!" article prior to its publication. Russell testified that a third member of the four-person committee "saw" the article. Only one committee member, however, knew it was to be published. There was also evidence that the article was "available" to the members of the board of directors of the HBPA, but no evidence that any of the remainder of the directors read it. There was no testimony regarding any board member's belief in the truth of the statements made in the article. One board member even cautioned Russell, prior to publication of October 1981 issue, against using the journal to support a "personal vendetta" against Louisiana Downs.

Since a mere failure to investigate the factual basis of the article by the one committee member who knew the article was to be published could not alone support a finding of actual malice, *St. Amant*, 390 U.S. at 733, 88 S.Ct.at 1326, it is clear Bartimo failed to carry

his burden of showing actual malice on the part of the HBPA. The only real connections between the HBPA and the article were the HBPA's partial financial support of the journal as a whole and its encouragement of Russell and cooperation with him in aspects of the enterprise other than the "Outrage!" article itself. While such connections would lend support to a theory of imputed fault, they have no bearing on the HBPA's actual malice as defined by *Sullivan*. The district court was therefore correct in finding in favor of HBPA.

The judgment is AFFIRMED.

Vincent J. BARTIMO

v.

HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION and Horsemen's Credit Union.

Civ. A. No. 81-2258.

United States District Court,
W.D. Louisiana,
Shreveport, Division

Aug. 28, 1984.

RULING FROM THE BENCH[1]

STAGG, Chief Judge.

Rule 41(b) of the Federal Rules of Civil Procedure provides that a plaintiff's complaint may be dismissed involuntarily at the close of his case-in-chief on the ground that, upon the facts and the law, the plaintiff has shown no right to relief. The Horsemen's Benevolent and Protective Association ("H.B.P.A."), Home Insurance Company, Thomas Russell and *Racing Journal*, all defendants herein, have made a motion for involuntary dismissal of Vincent J. Bartimo's claims pursuant to Rule 41(b).

Although it may take me a good part of the afternoon properly to explain why I find that I must grant the motion under 41(b), I say it in the beginning to remove the suspense and theatrics that attend when the parties wonder what the judge is going to say. I believe you should know that while I might find the law to be disagreeable, I am not in a position to deviate from it. I found, in fact, something that gave me some hope for the future when I was reading in the *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). In Section III, the court noted:

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[1]The press of my caseload requires that all cases be decided by rulings from the bench. The usual opening caveat reserves the right to reduce the oral ruling to writing with proper grammar and punctuation and complete citations of authority (without, of course, changing findings or conclusions). Notice of appeal having been filed in this matter, it is appropriate that the ruling, *viva voce*, now be put in written form.

> It is nevertheless urged by respondent that the balance struck in *New York Times* should now be modified to provide further protection for the press when sued for circulating erroneous information damaging to individual reputation. *It is not uncommon or improper, of course, to suggest the abandonment, modification, or refinement of existing constitutional interpretation, and notable developments in First Amendment jurisprudence have evolved from just such submissions.* But in the 15 years since *New York Times*, the doctrine announced for that case, which represented a major development and which was widely perceived as essentially protective of press freedoms, has been repeatedly affirmed as the appropriate First Amendment standard applicable in libel actions brought by public officials and public figures.

99 S. Ct. at 1645 (emphasis added).

[1] The grounds for the granting of the Rule 41(b) motion are that, by Mr. Bartimo's evidence, he has failed to establish that Russell and the other defendants published the offending article with "actual malice" as that term is *now* defined in the federal jurisprudence. This district court, like any other, is required now to make findings of fact and to reach conclusions of law under Rule 41(b).

FINDINGS OF FACT:

There is no question, as a preliminary matter, that the case is properly within the jurisdiction of this court, and there is no issue as to the propriety of the parties, or the joinder of issues. There is no need at this time to repeat the stipulated facts that were contained in the Pretrial Order and read into the record at the beginning of trial. *See*, Appendix I.

It suffices to say that Mr. Bartimo alleges that he was defamed under Louisiana law by the article entitled "Outrage!," which was written by Mr. Russell, and published in the first issue of *Racing Journal* in October 1981. *See*, Appendix II. It has been established positively that Mr. Russell was the author of the article, and that he was responsible for the publication, editing, printing and distribution of the magazine. I find as a fact that the initial issue of *Racing Journal*, and all subsequent issues of the magazine were sponsored and funded by the Louisiana Division of the H.B.P.A. This fact is well established,

not only by the testimony of the members of the Board of Directors of the Louisiana Division of the H.B.P.A. and the Minutes of Board meetings of the organization, but also the testimony of Mr. and Mrs. Russell.

According to Mr. Bartimo's complaint, his reputation was seriously impuned by the allegations in the article linking him to elements of the Mafia, and referring to him by the pejorative nickname of "Snake." Additionally, Mr. Bartimo complains of the reference to him in the article as "hit man," along with the implication that such "hit men" are known to dispose of their opponents by deadly and violent means. Mr. Bartimo testified on direct examination that he was not, nor had he ever been, a member of the Mafia or any known affiliate of the Mafia. He testified that he had never been referred to by the pejorative nickname of "Snake." He also testified that he had never made the assertion that he owned or controlled members of the Louisiana Racing Commission; he asserted that he has suffered personal harm, personal damage to his reputation, his ability to earn a living, and his peace of mind, all as a result of the article's appearance in the *Racing Journal*.

I listened carefully to the evidence about Mr. Bartimo's reputation. If I were in the box, I would want to hear reputation testimony from such persons as those called by Mr. Bartimo. Their testimony tended to prove that Mr. Bartimo's reputation *has not* been damaged by the allegations written by Mr. Russell. To the contrary, all of the character witnesses called to the stand to testify stated that Mr. Bartimo enjoyed an excellent reputation in this community both before *and after* October of 1981.

Insofar as the allegations about job opportunities referred to in Mr. Bartimo's deposition and direct testimony. I find that he has, in fact, interviewed persons involved in the horse racing business who were seeking to obtain his advice and services, or both. These interviews were not at all affected by anything that Tom Russell or others might have said or written about Mr. Bartimo.

Because of my factual findings and the state of current libel law jurisprudence, I find that Mr. Bartimo failed to establish liability on the part of any defendant, and it is, therefore, not necessary to determine the extent of damages suffered by way of embarrassment,

humiliation or emotional distress. Should on some future day I am found to have decided this case wrongfully, there will be sufficient time to take up the matter of damages.

LEGAL STANDARDS:

The legal standards which I must apply were well briefed by the lawyers. I say this because counsel for Mr. Bartimo is going to find that I put the emphasis on a particular case that I read differently than he does.

Defamation by way of libel traditionally established a cause of action in tort in both common law and under Louisiana Civil Code art. 2315. In *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the United States Supreme Court determined that libelous utterances fall within the area of constitutionally protected speech. *See, Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). Thus, I am required to evaluate Mr. Bartimo's defamation claims according to the provisions of Louisiana law as circumscribed by constitutional protections heavily written in the federal jurisprudence. The legal milieu is complex and, at times, frustrating. However, I am required to evaluate Mr. Bartimo's claims in this context.

The case of *Manale v. City of New Orleans, Department of Police*, 673 F.2d 122, 125 (5th Cir. 1982), says these are four elements to be considered under Louisiana libel law:

1. Publication, *i.e.*, communication to some third person;
2. Falsity;
3. Malice; and
4. Resulting injury.

The *New York Times* case, *supra*, and its progeny placed a constitutional restraint on state law by requiring proof by clear and convincing evidence that the alleged defamatory remarks leveled at a "public official" or, now, "public figure," were made with "actual malice," not implied malice. In another landmark decision, the United States Supreme Court, expanding on *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), held in *Gertz*

v. Welch, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), that the "actual malice" standard also applied to "public figures." In *Gertz*, the court defined a "public figure" in the following terms:

> Respondent's characterization of petitioner as a public figure raises a different question. That designation [public figure] may rest on either of two alternative bases. In some instances, an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

94 S.Ct. at 3012-13.

The Supreme Court justified its distinction between public officials and private citizens who became public figures and regular private citizens in *Gertz* in the following manner:

> [W]e have no difficulty in distinguishing among defamation plaintiffs. The first remedy of any victim of defamation is self-help — using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.

Id. at 3009. Applying the standards of *Gertz*, I began late yesterday afternoon with the assertion that I found Mr. Bartimo to be a "public figure."

Now, if the concept of actual malice is to be understood at all, it can only be understood in this case by reading what the Court *says* the concept means — because the term is not what you and I might conclude it is by merely reading the words.

[2] "Actual malice" is defined by the Supreme Court as "knowledge that the statement was false or was made with reckless disregard of whether it was false or not." *New York Times*, 84 S.Ct. at 725-26; *Golden Bear Distributing Systems v. Chase Revel, Inc.*, 708 F.2d 944,

950 (5th Cir.1983). Whether a defendant acted in "reckless disregard" of the truth or falsity of his statement must be determined by applying the following standard:

> There must be sufficient evidence to permit the conclusion that the defendant, in fact, entertained serious doubts as to the truth of his publication.

St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968); *Golden Bear Distributing Systems, supra*, at 950; *Herbert v. Lando, supra*, 99 S.Ct. at 1639. In *St. Amant*, the Court specifically noted, "that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *Id.* 88 S.Ct. at 1325. Thus, it has been well established in the federal jurisprudence that failure to investigate does not constitute "reckless disregard," *per se.*

St. Amant placed some restrictions on the protection granted by the "reckless disregard" standard:

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

88 S.Ct. at 1326. *See also, Herbert*, 99 S.Ct. at 1643, note 12.

Because of the importance of our First Amendment guarantees, the Supreme Court has placed a most heavy burden of proof on a public figure seeking defamation damages. The most recent reassertion of this heavy burden was set forth by the Court in *Bose Corp. v. Consumers Union of U.S., Inc.*, —U.S.—, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984):

> The burden of proving "actual malice" requires a plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement.

104 S.Ct. at 1965, note 30. Likewise, in *Brewer v. Memphis Publishing Co., Inc.*, 626 F.2d 1238 (1980), the United States Court of Appeals for the Fifth Circuit applied this heightened burden of proof imposed on a public figure plaintiff in a defamation action.

CONCLUSIONS:

[3] During Mr. Bartimo's testimony yesterday, I made the express finding that Mr. Bartimo was a "public figure," as contemplated by the federal jurisprudence. There can be no question that Mr. Bartimo was the subject of extensive media coverage and public attention during his tenure as president and general manager of Louisiana Downs. Ms. Marie Gifford Wright, the retired manager of a local radio station, testified that Mr. Bartimo frequently appeared in the press as a result of his position. She stated that Mr. Bartimo's activities "generated a lot of press," and that many of Mr. Bartimo's activities were "in the public interest." She stated that Mr. Bartimo regularly held press conferences which the media representatives attended, and that Mr. Bartimo's managerial actions were generally reported on in the media.

Mr. Bartimo's own testimony corroborated and effectively reiterated that of Mrs. Wright. He admitted that Louisiana Downs and its officials were the center of public interest and concern during the period 1980 through 1982, and that events related to the track generated substantial press coverage. It must be concluded in light of *Gertz*, *Brewer* and *Rebozo v. Washington Post*, 637 F.2d 375 (5th Cir. 1981), that Mr. Bartimo was a "public figure" actively involved in matters of extensive public attention, and that he voluntarily injected himself into these matters.

As set out above, in order to prevail in any defamation action, the plaintiff must prove that the defendants' assertions were published, and that the assertions were false. There can be no question of publication in this case. Over 5,000 copies of the "Outrage!" article were distributed to individuals involved in the horse racing industry, the

press, public officials and others. Thus, Bartimo established publication of the "Outrage!" article.

It is my opinion, and I expressly find, that the statements concerning Mr. Bartimo printed in the "Outrage!" article contained in the October 1981 issue of *Racing Journal* were false. Mr. Bartimo expressly denied any link with organized crime, particularly the Mafia, or any other criminal activities, and this testimony was unrebutted. The defendants failed to produce one shred of evidence tending to prove, or even infer, that Mr. Bartimo was, or is, actually connected with any criminal element. The allegations linking Mr. Bartimo with the Mafia must be classified as totally false and patently scurrilous. However, under the law, falsity of an assertion concerning a public figure does not establish liability in a defamation action.

After a complete review of the evidence adduced at trial, and the wealth of legal authority on the law of libel, I must conclude as a matter of law that Mr. Bartimo failed to prove by clear and convincing evidence standards that Thomas Russell or the other defendants published the "Outrage!" article with "actual malice." Mr. Bartimo failed to prove that any of the defendants had actual knowledge that the assertions were in the "Outrage!" article were false. Likewise, Mr. Bartimo failed to prove by clear and convincing evidence that Mr. Russell or the other defendants published the "Outrage!" article with "reckless disregard" for the truth or falsity of the assertions made in the article.

In the oral arguments, counsel for Mr. Bartimo attempted to counter the language in the *St. Amant* case by requiring the finder of fact to determine whether the publication was, indeed, made in good faith — for example, that there was no fabrication, no product of the imagination. How do these arguments on subjective good faith apply to Mr. Russell? The question can be formulated in this manner: does a man who intensely dislikes another man and believes him to be a tyrant or a dictator, and who believes the other man to be guilty of outrageous conduct against a heroic friend, ever be found by the *St. Amant* standard to be in good faith? This is particularly applicable to a man like Tom Russell, who may or may not be engaged in a personal vendetta against a man like Vince Bartimo? I am required

to determine the absence of actual malice, not the presence of subjective good faith.

Mr. Russell testified that he attended two trials in New Orleans concerning race fixing. He said, in addition, that he acquired the depositions from those trials and read them. He said he went to Vermont to check on Mr. Bartimo's previous employment there. He went to the Bossier Parish Court House to check records there. He hired someone to follow Lawrence Solow, a man of questioned reputation who he said was an alleged friend of Mr. Bartimo. He said he interviewed Billy Fox and Irvin Magri Jr., both of whom were connected with the racing trials in New Orleans. He said he talked with various people at the Green Mountain Race Track in Vermont concerning Mr. Bartimo's activities there. He talked to former track employees and to individuals who raced there. He went to the Bennington Banner newspaper office and spent three of four days reading documents having to do with Mr. Bartimo's having been fired from the Green Mountain Race Track.

Mr. Russell said he made a study of the petition in the "sticker" case, and I had to look in the record to find that the sticker case involved cleated shoes on horses for turf races, a controversy where, according to Mr. Russell, all the people who signed the petition were ruled off the track by Mr. Bartimo. He said he interviewed a man named Keith Hortstein, a former reporter with the *Shreveport Journal*; and he said he got a copy of everything that had been in the paper about Vincent Bartimo. He said he interviewed Herb Roberts and Barry Lamonte, both of whom were thrown off the Louisiana Downs track. He said he talked to Mr. Bartimo before he was discharged by Mr. Bartimo, and that later Mr. Bartimo would not talk to him.

Mr. Russell called Orville Henry at the *Arkansas Gazette* about an article on Louisiana Downs which had some allusions to Mafia connections by people who lived in Youngstown, Ohio. [Mr. Bartimo worked for Mr. DeBartolo, who lives in Youngstown, Ohio. *See* Exhibit P-3.] Most important, I think, was that Mr. Russell testified that he relied heavily on that newspaper article that Mr. Henry had written back in 1979. It is clear from Mr. Russell's testimony, and from that of Mr. Bartimo, that Mr. Russell *and* Mr. Bartimo perceived that the

Henry article was accusing Mr. Bartimo of being a member of the Mafia. There is in the evidence a pair of letters written by Mr. Bartimo to Mr. Henry, one demanding an apology for the Mafia-related allegations. There is a copy of the article in the paper in Arkansas where a retraction was made of the earlier Henry article. Mr. Russell testified, without any rebuttal, that he called Mr. Henry to discuss the story, and that Mr. Henry did not tell Mr. Russell that the retraction had been published.

There was ample testimony that there was no love lost between Mr. Bartimo and Mr. Russell. I expressly find that, as a fact, Mr. Russell did not like Mr. Bartimo as a result of their prior relationship in the racing business at Louisiana Downs. However, bad blood and bad relations do not constitute bad faith, as contemplated in the *St. Amant* line of cases.

Those cases require proof, by clear and convincing evidence, that defendants possessed a high degree of awareness of the article's falsity or probable falsity. This test is a subjective one. Mr. Bartimo failed to prove to the appropriate degree that Mr. Russell actually had a conscious belief of the probable falsity of the allegations made in the "Outrage!" article. Likewise, Mr. Bartimo has failed to present circumstantial evidence of sufficient weight to allow this court to infer a conscious belief by Russell in the probable falsity of the "Outrage!" article's allegations. In the absence of such a showing, Mr. Bartimo, as a public figure, cannot prevail in his claims based on Mr. Russell's assertions in the "Outrage!" article.

As I stated during argument on the Rule 41(b) motion, I tend to agree with Mr. Justice Fortas in his dissent in the *St. Amant* case — that the First Amendment should not to be a shelter for the character assassinator to further his actions that are heedless and reckless or deliberate. I know that dissenting opinions are not the law, but when I read Justice Stewart's convincing dissent in *Herbert v. Lando, supra*, I found myself nodding affirmatively. These are the words written by Justice Stewart in his *Herbert* dissent:

> Although I joined the Court's opinion in *New York Times*, I have come greatly to regret the use in that opinion of the phrase "actual malice." For the fact of the matter is that "malice" as

> used in the *New York Times* opinion simply does not mean malice as that word is commonly understood. In common understanding, malice means ill will or hostility, and the most relevant question in determining whether a person's action was motivated by actual malice is to ask "why." As part of the constitutional standard enunciated in the *New York Times* case, however, "actual malice" has nothing to do with hostility or ill will, and the question "why" is totally irrelevant.

99 S.Ct. at 1661.

The gravamen of a lawsuit such as this concerns that which was in fact published. What was *not* published, the author's motive, has nothing to do with the case. Liability ultimately depends upon the publisher's state of knowledge of the falsity of what he published, not at all upon his motivation in publishing it — not at all, in other words, upon actual malice as those words are *ordinarily* understood.

This is not the first time that judges and lawyers have been led astray by the phrase "actual malice" contained in the *New York Times* opinion. In *Greenbelt Cooperative Publishing Association v. Bresler, Md.*, 398 U.S. 6, 90 S.Ct 1537, 26 L.Ed.2d 6 (1970), another defamation suit brought by a public figure against a publisher, the trial judge instructed the jury that the plaintiff could recover if the defendant's publication had been made with malice, and that malice meant "spite, hostility or deliberate intention to harm." In reversing the judgment for the plaintiff, the court said that this jury instruction constituted "error of constitutional magnitude."

Had this case gone to a jury, as it was originally scheduled to do, I would have had to prepare and to give to a jury an instruction couched in the language of *New York Times*, the language of *St. Amant*, and the cases that followed. Otherwise, reversal would have occurred, since it would have been error of constitutional magnitude for me to tell a jury that one can find actual malice in spite, hostility or deliberate intention to harm. Under the testimony in this case, a jury could have found those to have been the motives of Thomas Russell. Even the members of the H.B.P.A. Board stated in its Minutes, "We won't have this magazine become an organ of personal vendetta by Thomas Russell against Louisiana Downs." However, I am reminded that motive of the publisher is not relevant.

In the *St. Amant* case, the Supreme Court set out the law clearly:

> It may be said that [the "reckless disregard"] test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity. Concededly, the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standards of a reasonable man or the prudent publisher. But *New York Times* and succeeding cases have emphasized that the stake of people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to assure the ascertainment an [sic] publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.

88 S.Ct. at 1326.

I may fully agree with Mr. Justice Stewart. I may believe the Russell article to be a thoroughly scurrilous attempt at character assassination. I may totally *disbelieve* that there are any Bartimo/Mafia connections. But, while I firmly believe Tom Russell wrote with actual old-fashioned malice in his heart, the current status of the "law of the land" as shown in the compendium of Supreme Court decisions, decisions which I am duty-bound to follow and apply here, requires this trier of fact reluctantly to rule in favor of the defendants. Perhaps Mr. Bartimo will carry the battle to the next level of our court system — and beyond. Maybe someday the law will change to reflect a more palatable standard in libel cases.

For the reasons which I have discussed this afternoon, I find it necessary, under the law and facts adduced in Mr. Bartimo's case-in-chief, to GRANT the defendants' motion for involuntary dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. It is my opinion that the dismissal of the plaintiff's claims disposes of the cross-claims lodged among the defendants. If this is not the case, I would suggest that motion practice is the appropriate vehicle by which

to address any remaining dispute. Therefore, Judgment is ENTERED against Vincent J. Bartimo on his substantive claims against all of the defendants, and in favor of Thomas F. Russell Jr., the Horsemen's Benevolent and Protective Association, *Racing Journal* and Home Insurance Company.

APPENDIX I

The following stipulated facts were listed in the Pretrial Order submitted by the parties prior to trial:

The publication of the October 1981 issue of the *Racing Journal*.

There has been no retraction to any portion of the article entitled "Outrage!," which appeared in the October 1981 issue of *Racing Journal*.

The article "Outrage!" which appeared in the 1981 issue of *Racing Journal* was written by Thomas F. Russell Jr.

The policy issued by the Home Insurance Company to the Horsemen's Benevolent and Protective Association provides coverage to the Horsemen's Benevolent Association for the damages allegedly sustained by the plaintiff, Vincent J. Bartimo.

Thomas F. Russell Jr. was not authorized by the Board of Directors of the Horsemen's Credit Union to execute any agreement which the Horsemen's Credit Union would indemnify and hold harmless the Horsemen's Benevolent and Protective Association for any liability which might result from publication of *Racing Journal*.

APPENDIX II

OUTRAGE!

[seal]

LOUISIANA
STATE RACING COMMISSION

May 13, 1981

ALBERT M. STALL
CHAIRMAN
PATRICK C. McGINTY
SECRETARY

SUITE 1020 (ONE SHELL SQUARE)
701 POYDRAS STREET
NEW ORLEANS, LOUISIANA 70130

Owner Trainer, William I. Fox
License # JD15070
4021 Lemon Street
Metarie, La. 70002

Dear Mr. Fox:

You are hereby directed to appear before a board of Stewards at Louisiana Downs, on May 20, 1981, at 10:00 A.M. to answer questions regarding allegations made by you concerning the qualifications of the Stewards during open testimony in civil district court, parish of Orleans, in the trial of Daniel E. Coates VS Fairgrounds Corporation and Irwin Magri, Jr., consolidated with Laurence Solo VS Fairgrounds Corporation and Irwin Magri, Jr.

You are entitled to legal representation if you so desire and it will be your responsibility to notify your representative of the time and date.

RICHARD M. HOBAN
State Steward

Vincent Bartimo, the General Manager of Louisiana Downs, has done what no other man in the United States has ever done. He called a Stewards Hearing, then suspended from racing a man for giving sworn testimony before a jury about an attempt to fix a race. It is an outrage.

Probably no other act has ever outraged the sense of justice of horsemen, and certainly no other single event has so unified the

horsemen of the United States. States of Louisiana, Kentucky and Illinois have already seen their H.B.P.A. act in consort and condemn Bartimo and his Stewards for their action. This is the first true story concerning Fox and alleged Mafia Lieutenant Vincent Bartimo. (Ed's Note: In a copyrighted article in the Arkansas Gazette Orville Henry disclosed that Bartimo was a Lieutenant in the army of DeBartolo.)

Billy Fox is not the kind of guy that figured to become a hero. On the contrary, to those who have met him for the first time he is a diminutive, black haired individual with a rather impish smile. His looks would belie the fact that he has been married 19 years with four children. Those who know him, however, realize that despite his youngish looks, he has been married to Patsy since they met at Saratoga where he claims she was there for the express purpose of meeting and marrying a leading jockey (which Billy was when he worked for Darby Dan Farm).

They have followed the race track through the years, raising their family while handling some of the best horses that have raced in Louisiana and adjoining states. His proudest moments concern the family. One little story tells the true story. Racetrackers raise their families around horses and Bill has been no exception. This year, one of his dreams culminated when their youngest daughter was approved to ride in an accredited race in Kentucky. They had worked for this moment for years — together, family, Mother, Dad and Tammy. When they went to the paddock Bill was trying to be calm, instructing his daughter in the manner in which to ride. "Stay cool, be calm, just because it's your first race don't get excited, stay collected." He heard the call, "Jockeys up," and promptly threw Tammy over the horse!

But there is and always has been a serious side to Billy Fox. He has fought for the horsemen and the integrity of the Sport of Kings. When he offered to serve the H.B.P.A., his election was tantamount when his name appeared because the horsemen have an unfailing trust in his integrity and honesty. He has never failed them and it was in this spirit that the latest episode of Billy Fox's life began.

Here, for the first time made public, is the sworn testimony (insignificant testimony has been omitted) of Billy Fox before the jury on April 1, 1981, in the case of Laurence Solow versus Fair Grounds

Corporation and Irwin Magri, Jr. To summarize the case, Fair Grounds Corporation had barred or attempted to bar two individuals indicating they were known bookmakers and alleged fixers of races. One of the individuals was a man named Larry (Laurence) Solow. Solow was alleged to have been involved in the fixed Bye Gem race. Quoted here is the pertinent testimony Billy Fox gave in sworn testimony before the jury.

The cast of characters in this senario are Laurence (Larry) Solow, an alleged fixer and bookmaker; Lawrence Ribodeaux, trainer for Vincent Bartimo; and Vincent Bartimo, President of Louisiana Downs and unaffectionately called "Snake" before he was fired as General Manager of Green Mountain Race Track in Bennington, Vermont; Mr. Brenner, Attorney for Solow; Mr. Roussel, Attorney for Fair Grounds, Inc.

The Witness: (Billy Fox)

On August the 27th, I had two horses entered in the first race at Louisiana Downs.

The Court:

What year?

The Witness:

1980.

The Court:

Okay.

The Witness:

On August the 26th, the night of August the 26th, Mr. Solow called my home and said, "I understand you have two horses that can both run in the first race." I said, "Yeah, I think they can both run." He said, "We have a chance to make a lot of money here." He said, "Mr. Robideaux's horse will be the favorite. I can kill him. All you have to do is tell me which one of your horses you'll let run and we'll be able to make a lot of money." I said, "Well, I don't do that. I never had. And both of my horses can run and get whatever they can." He said, "Well, if you change your mind

call me at the hotel at ten o'clock the next morning." I said, "I won't be calling you."

CROSS-EXAMINATION

By Mr. Brenner:

Q. *You mean you didn't report an attempt to influence you because the head investigator wasn't there?*

A. That's exactly right, and I'll tell you the reason why, because the other man I could have reported was Vincent Bartimo, and I've seen him with Mr. Solow frequently.

. . . . . .

Q. *No. Now, this man you say you didn't want to report to because nothing would have come of it —*

A. Vincent Bartimo.

Q. *And exactly what is his function?*

A. General Manager of the race track, Louisiana Downs.

Q. *Tell us again the reason you wouldn't report it to him.*

A. Because I've seen Mr. Solow and Mr. Bartimo on numerous occasions having lunch in the Club House, and he's a good friend of his, evidently.

. . . . . .

Q. *Now, at Louisiana Downs there are three Stewards, are there not?*

A. Yes, sir.

Q. *Could you tell us why you didn't report it to the Stewards?*

A. Well, you kind of have to be up at Louisiana Downs to know what goes on.

Q. *Well, sir, you tell us please.*

A. Vincent Bartimo runs everything. He tells how many rolls of toilet paper to buy on up to running the restaurant, and he hires the stewards, the other two stewards, and he has complete control

of everything that goes on there.

Q. *Well isn't there one steward who's appointed by the State?*

A. He's the one that got the job appointed by Gus Majolis that had never seen a race track before in his life, and he got the job because he was a friend of Gus Majolis.

Q. *What does it matter he hadn't seen a race track before? Can you tell us why it matters because he hadn't seen a race track before?*

A. In other words, he's not qualified to be a steward. He got a job because Gus Majolis appointed him, and Gus Majolis and Vincent Bartimo are extremely close.

. . . . . .

Q. *The fellow you're talking about who's not qualified to be a steward.*

A. General Hoban, H-O-B-A-N.

Q. *You say General?*

A. Yes, sir.

Q. *He's a former general in the Air Force, is he?*

A. He was a general in the Air Force in charge in buying the food for the Air Force base, and he bought the fish from Gus Majolis while he was working — while he was in the Air Force, and that's his connection with Gus Majolis.

Q. *Do you have any reason to think General Hoban or Mr. Majolis or anyone else would not have acted on your complaint if you told them what you just told the Court?*

A. Yes, sir.

Q. *What is the reason?*

A. I just told you because Larry Solow and Vincent Bartimo evidently are close friends. I see them together on numerous occasions, and Vince controls everything at Louisiana Downs."

When Louisiana Downs' President heard about this he barred Fox from saddling, training, entering or racing horses at the track. There was some rumor that the reason Fox was barred was because he had

participated in the petition concerning the "Sticker Case," but the truth was that "Snake" had decided that he would teach Fox a lesson. Bartimo, with a stockholders' meeting out of the way (where his alleged Mafia connections and partnership with convicted felon Charles E. Roamer II were exposed) the previous day, had the Stewards write two letters -- one to Fox demanding that he appear before the Stewards. The other letter was to bring before the Stewards the man who charged Bartimo with being alleged Mafia and of being a partner with a man convicted in the Brilab Scam in New Orleans along with Carlos Marcello, referred to as the Godfather of the Southern Mafia.

On May 13th (the day after his stockholders' meeting), Fox was written the letter printed at the beginning of this article. Outrageously, Bartimo ordered the Stewards to hold a hearing concerning allegations made by Fox in sworn testimony before a jury.

In an interview Fox stated that he received the letter in Kentucky but he had already had wind of what was going on. "I had information that Bartimo had called a meeting of four or five people and had given the instructions what to do." Interestingly enough, present at the meeting along with State Steward Richard Hoban, was Security Chief Frank Pernici among others. When they came up with the idea of a Stewards Hearing, Hoban objected, claiming, "You can't do that, Fox has a right to his opinion." Hoban was instructed to call the meeting and rule him off, period, and that's what happened.

On June 13, 1981, the Daily Racing Form printed the official ruling from Louisiana Downs Stewards:

OFFICIAL RULINGS

Louisiana Downs

"Owner-Trainer, William L. Fox, license JD 15070, is suspended for the remainder of the meet plus 10 days and referred to the Louisiana State Racing Commission with the recommendation that his suspension be continued for whatever time deemed appropriate. Mr. Fox was found to be in violation of LAC 11-6-2. (General rules, par. 2.4 and par. 2.6). All horses owned in whole or in part by him, or under his care or supervision, shall be ineligible to be entered or

to start unless transferred by a bona fide sale or lease to a person in good standing and approved by the stewards. During suspension, he is denied access to the grounds of all racetracks under the supervision of the Louisiana State Racing Commission."

And, of course, Bartimo had it published on his machine and sent out over the wire not only to The Racing Form but to his newspapers, The Times and Journal in Shreveport. (Ed's Note: This favorable publicity comes from Bartimo's habit of playing to the press. He hired the sport's editor of the Bennington Banner to be Racing Secretary at Green Mountain Race Track and he has followed the policy at Louisiana Downs. Former journalist Bob Forrest of the Shreveport Journal was hired by Bartimo in order to get favorable publicity. It is also rumored the Shreveport Times sports reporter Bill McEntyre has made a deal to go to work for Bartimo after retirement [McEntyre was unavailable for comment]. If Bartimo can't get favorable reporting, he goes after the job of the reporter as he did to Keith Hartstein of the Shreveport Journal. Bartimo prevailed on owner-breeder, Fasig-Tipton Director Susan McCormick, daughter of the owner of the Shreveport Journal, to fire Hartstein after he had written several articles critical of Louisiana Downs.)

Fox feels that the net result of this outrageous ruling was the loss of 18 horses that he had previously been training that were going to Louisiana Downs. "A couple of owners called Bartimo to get stalls for me at the time and he told them if they would change trainers he'd give them stalls and they did." (Ed's note: This is an old Bartimo trick since the days of Green Mountain from which he was fired according to court documents furnished this author. In Case No. C43-74BC, State of Vermont, the Rooney interests (owners of Green Mountain Race Track) alleged that under Bartimo's direction "certain income of Green Mountain was received but not entered on the books" and alleged "that there may have been wrongful disbursement of funds." On December 21, 1977, the Rooneys amended their petition by stating "they were informed and believe and therefore allege that Bartimo negligently failed to exercise a proper degree of business acumen in the performance of his duties, was negligent in the same, failed to carry out his duties in a proper business like fashion, thus resulting in substantial loss to said Green Mountain Racing Corpora-

tion." Bartimo has used similar tactics against black trainers Daria Lamonte and Herb Roberts for which they are presently bringing suit.)

Fox has been damaged and he is filing suit over the suspension. The new Racing Commission has an opportunity to set this matter straight, but it's rumored that Bartimo has three men on the Racing Commission including one Stockholder of Louisiana Downs and one business partner of an associate of the "Snake". Bartimo has already commented that he will own the new Racing Commission just like he did the last one.

Fox is concerned, not just about himself, but he is worried that unless that dictatorial policy of the alleged Mafia boss Bartimo is halted the plight of the horsemen in Louisiana will get worse. If horsemen are suspended for giving information to a jury about a fixed race, what is next? Can a horseman have an opinion, or will he be silenced? Are the horsemen willing to be crushed like ants as Bartimo has threatened? How much longer will he be able to run roughshod over the horsemen?

The Mafia has long been known for their ability to "hit" anyone, usually by gang slayings. If Bartimo gets away with this attempt on "Billy Fox" his next hit could be you.

(This is the first part of an interview with Bill Fox. The second part will be in the next issue.)

Supreme Court, U.S.
FILED
MAR 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

Number 85 — 1065

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

VINCENT J. BARTIMO,

Petitioner

versus

HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, HOME INSURANCE COMPANY, THOMAS F. RUSSELL, JR., AND THE RACING JOURNAL,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

Number 85 — 1065

VINCENT J. BARTIMO,

Petitioner

versus

HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, HOME INSURANCE COMPANY, THOMAS F. RUSSELL, JR., AND THE RACING JOURNAL,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Respondents, Horsemen's Benevolent and Protective Association, Home Insurance Company, Thomas F. Russell, Jr., and the Racing Journal, Inc., respectfully request that this Court deny the petition for writ of certiorari seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 771 F.2d 894 (5th Cir. 1985).

Statement of the Facts

The facts of the case are stated fully in the decisions of the District Court (Petitioner's Appendix at A-14) and the Court of Appeals (Petitioner's Appendix at A-1).

Argument

1. THERE IS NO CONFLICT WITH DECISIONS OF THIS COURT OR OTHER COURTS OF APPEALS.

Petitioner claims the decision of the Fifth Circuit Court of Appeals conflicts with decisions of this Court and other Courts of Appeals in that the Fifth Circuit failed to independently examine the whole record in its review of this matter. Specifically, petitioner alleges that the Court of Appeals erred by declining to review the subsidiary factual findings supporting its ultimate determination regarding petitioner's failure to prove actual malice by clear and convincing proof.

The Court of Appeals was cognizant of the duty imposed by *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. _____, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984), to exercise independent judgment in its review of the trial court's finding that petitioner failed to prove actual malice as well as its obligation to indepen-

dently review the entire record in reaching its decision on this issue. See 771 F.2d 894; Appendix at pg. A-3, A-5 and A-6.

With this standard of review in mind, the Court of Appeals analyzed and discussed in detail each alleged defamatory remark in terms of the evidence adduced by petitioner. A review of the Court of Appeals decision leaves no doubt that it did in fact "independently examine" the "whole record" in reaching its decision. Based on that independent examination, the Court affirmed the trial court's decision that petitioner failed to meet his burden of proving actual malice.

The Court of Appeals correctly concluded that under the guidelines set forth by this Court in *Bose, supra,* the proper standard of review did not require review of credibility findings or subsidiary factual findings. The decisions of this Court and other Courts of Appeals cited by petitioner in support of his petition concerning independent review of these matters simply do not support the proposition. *E.g., New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); *Bose Corp. v. Consumers Union of United States, Inc., supra; Buckley v. Littell,* 539 F.2d 882 (2d Cir. 1976); *McDowell v. Paiewonsky,* 769 F.2d 942 (3d Cir. 1985); *Hardin v. The Santa Fe Reporter, Inc.,* 745 F.2d 1323 (10th Cir. 1984).

2. THE FIFTH CIRCUIT'S DECISION DID NOT HOLD THAT A PUBLIC FIGURE PLAINTIFF FAILS TO MEET THE BURDEN OF SHOWING "ACTUAL MALICE" MERELY BECAUSE SOME OF THE FALSE STATEMENTS ARE PRECEDED BY THE WORD "ALLEGED."

Petitioner contends that the Court of Appeals' opinion placed improper reliance on the use of the word "alleged" preceding certain Mafia allegations in the article in question. It is patently obvious from a reading of the Fifth Circuit decision that its comments concerning the use of the word "alleged" concern the interpretation a reader may give the article and do not afford an unbridled constitutional protection to an author through the use of the word "alleged." In commenting on the use of the word "alleged," the Court below said:

> "The trial and the arguments of counsel below and on appeal focused almost exclusively on Russell's references to Bartimo's alleged ties with the Mafia. At the outset, we note that each reference is prefaced by the word 'alleged.' There is thus the threshold problem of interpreting — or misinterpreting — what Russell intended to say. While the story in its entirety may appear to assert the truth of Bartimo's Mafia ties, it carefully avoids doing so explicitly by using the word 'alleged.' In our view, the "Outrage!" article's reference to Bartimo and the Mafia can be read as no more than a report that Bartimo has, at some time or another, been allegedly connected with the Mafia." 771 F.2d at 899.

Thomas Russell, Jr. testified he relied on statements in an article written by Orville Henry in the June 14, 1979, issue of *The Arkansas Gazette* which suggested that Bartimo was a member of the Mafia. The Court below concluded that the article was susceptible of being interpreted as suggesting that Mr. Bartimo was a member of the Mafia. Significantly, petitioner interpreted the article in this manner. As stated by the Court of Appeals:

> ". . . we think the relevant portion of the article quite susceptible of the interpretation Russell placed upon it. Indeed, Bartimo revealed in his response letter to Henry that he himself interpreted the article as a 'declaration that I am a member of the Mafia.' Bartimo now argues that Russell could not have so interpreted the article but we think it clear that he could have, and, indeed, was quite reasonable in doing so." 771 F.2d at 900.

The Court below was careful to point out that its decision did not preclude recovery by public figure plaintiffs, but did require that they meet the heavy burden imposed upon them to prove their case by clear and convincing evidence. The Court of Appeals made the following comments concerning the plaintiff's failure to meet his burden:

> "It might be asked whether Bartimo could ever have done more to carry his burden or if the case ended when Russell testified under oath that he believed what he wrote. *The answer to the first question can only be that more could have been done.* For instance, Russell's state of mind as to some of the statements was not examined. Also, the telephone call Russell made to Henry was not testified to in detail. It may be that the obscureness of the record is due solely to the procedural disposition of this case. It may be that Bartimo brought out all the testimony in his favor when he had the opportunity and that there simply was not more evidence to adduce. In any event, it is clear to us that our holding leaves ample room for future plaintiffs to maneuver successfully within the *Sullivan* framework. The answer to the second question must therefore be the same "no" as that given by the Court in *St. Amant,* 390 U.S. at 732,

88 S. Ct. at 1326. *The case ended not when Russell testified to his own good faith, but when Bartimo failed to show that Russell subjectively doubted or recklessly disregarded the truth of the statements."* [Emphasis added.] 771 F.2d at 901.

Obviously, the Court of Appeals was of the opinion that more could have been done by the petitioner to meet his burden of proof. However, petitioner failed in that regard and the Court of Appeals correctly affirmed the decision of the trial court.

3. THE COURT OF APPEALS DECISION DID NOT INSULATE FALSE STATEMENTS MERELY BECAUSE THEY ARE FOUND TO BE THE PRODUCT OF LITERARY LICENSE.

Petitioner's final allegation is that the Fifth Circuit has unfairly insulated false statements from actions for liable where they are found to be "merely the product of literary license." The Court of Appeals in no way suggests that constitutional protection be afforded allegedly libelous statements that are "merely false or the product of literary license." On the other hand, the Court of Appeals, citing *New York Times Co. v. Sullivan, supra, Time, Inc. v. Pape*, 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45 (1970), *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979), and *Bose Corp. v. Consumers Union of United States, Inc., supra,* did make reference to a well established principal of First Amendment liable law requiring proof of actual malice in defamation cases involving public officials.

Petitioner's construction of the Court of Appeals' decision is strained. The Court of Appeals did not say that actual malice is not shown because the statements are "merely false or the product of literary license."

What the Court did say, however, is that recovery is not justified absent a finding of actual malice in addition to falsehood in order for a public figure to recover in a defamation action.

This Court has uniformly and consistently held that in order for a public figure plaintiff to recover in an action for defamation, he must prove by clear and convincing evidence that the statements were made with actual malice. Actual malice has been defined to be with knowledge that a statement was false or with reckless disregard of whether it was false or not. See *New York Times v. Sullivan, supra.* Petitioner simply failed in his burden of proof.

Summary of Argument

Petitioner, Vincent J. Bartimo, has applied to this Court for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit urging two basic reasons in support of granting the Writ. Initially, petitioner asserts that the decision of the Court of Appeals conflicts with decisions of this Court as well as other Courts of Appeals by failing to make an independent examination of the whole record in determining whether petitioner has met his heavy burden of proving actual malice and by declining to review the subsidiary factual findings supporting the ultimate determination regarding actual malice.

A review of the Court of Appeals' opinion clearly establishes that the Court of Appeals made an exhaustive review of the entire record in reaching its decision.

Insofar as the Court of Appeals' failure to review the subsidiary factual findings supporting the ultimate determination regarding actual malice, it is the position

of respondents that no such review is required under the decisions of this Court or the other Courts of Appeals.

Petitioner's second reason in support of his petition involves the resolution by the Court of Appeals of two fact questions which allegedly make it virtually impossible for a plaintiff to prevail in a First Amendment libel action. These fact questions involve the use of the word "alleged" to precede certain allegations and some imagined protection of statements which are the product of literary license. Respondents respectfully submit that the Court of Appeals' decision does not support the conclusions suggested by petitioner and that the Court of Appeals clearly did not expand the ambit of constitutional protection afforded by the First Amendment.

Conclusion

This petition for Writ of Certiorari should be denied for the reasons discussed above.

Respectfully submitted,

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